IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.134 OF 1996

1. Shantaram Krishna Karkhandis)
Age 35 years,)
)
2. Smt. Suman Shantaram Karkhandis)
Age 30 years.)
Both R/o. Village Ovala, Taluka &)
District Thane) ....Applicants.
(Orig. Accused Nos.1 & 3)

V/s

1. The State of Maharashtra)
2. Barkibai wd/o. Bhimku Mukadam,)
Village Kachoregaon, Post - Dombivli,)
Taluka Kalyan, District - Thane.) ....Respondents.

Mr. S.V. Kotwal for the applicants.
Ms. S.V. Gajare, APP for the State.

CORAM: V.M. KANADE, J.
DATE : 8th September, 2006.

ORAL JUDGMENT:

1. The applicants are original accused Nos. 1 and 3. They are challenging the judgment and order passed by the Assistant Sessions Judge at Thane who by his order dated 21/02/1994 convicted both the applicants for commission of the offence under section 313 read with section 34 of the

Indian Penal Code and sentenced them to suffer rigorous imprisonment for three years and to pay fine of Rs 3,000/- and, in default, to suffer further rigorous imprisonment for three months. Being aggrieved by the said judgment and Order, they preferred an appeal before the Sessions Judge at Thane vide Criminal Appeal No.31 of 1994. However, Sessions Court, Thane by its judgment and order dated 08/05/1996 dismissed the appeal and confirmed the judgment and order of the Assistant Sessions Judge. The applicants are challenging the aforesaid Orders; one passed by the trial court and the other passed by the Sessions Judge, Thane.

2. The prosecution case is that the prosecutrix Barkibai had worked as maid servant for three years with the applicants. It is alleged that the applicant No.1 committed sexual intercourse forcibly by threatening her. Thereafter, Barkibai became pregnant and she was taken to Dr. Saloman on 18/09/1986 and, thereafter, she was taken to Dr. Talegaonkar. It is alleged that Dr. Talegaonkar performed abortion without her consent on account of false

representation made by the applicants. The brother of the prosecutrix lodged a complaint at Narpoli Police Station and it was registered vide C.R. No.I-0/86 under sections 376, 313 read with section 34 of the Indian Penal Code. The prosecution examined in all four witnesses viz. Prosecutrix as P.W.1, Dr. Talegaonkar as P.W.2. Dr. Saloman as P.W.3 and the I.O. as P.W.4.

3. The trial court acquitted the applicant No.1 of the offence punishable under section 376. However, applicant Nos.1 and 2 were convicted for the offence punishable under section 313 IPC, which conviction was confirmed by the lower Appellate Court.

4. The learned Counsel appearing on behalf of the applicants submitted that both the lower Courts had clearly erred in holding that the applicants had committed the offence punishable under section 313 of the Indian Penal Code. He submitted that Dr. Talegaonkar had, in his examination-in-chief, stated that the prosecutrix had given her consent for abortion and, therefore, there was no

question of the abortion being performed without her consent. He submitted that both the lower Courts had erred in law on relying on the contradiction which was brought on record by the prosecution after P.W. 2 - Dr Talegaonkar was declared as hostile by the prosecution. He submitted that the conviction was based on the said finding which was recorded by both the Courts below. He submitted that such a finding, therefore, was liable to be set aside as it was perverse and contrary to the known canons of appreciation of evidence. He further submitted that the abortion, admittedly, was not performed by the applicants and the operation was carried out by Dr. Talegaonkar who was not made as accused in the said trial. He further submitted that both the Courts below erred in relying on only one part of the testimony of Dr. Talegaonkar and discarding the testimony which was in favour of the applicants.

5. The learned APP, on the other hand, submitted that there are concurrent findings recorded by both the Courts below and there was no reason to interfere with the order passed by the lower Courts and on that count the Revision

Application was liable to be dismissed.

6. I have given my anxious consideration to the submissions made by the learned Counsel for the applicants and the learned APP for the State. In my view, the prosecution has clearly proved that Dr. Talegaonkar had terminated the pregnancy of the prosecution. It is further established that the prosecutrix was admitted one day before the operation and, at no time, she had protested against the abortion which was performed by Dr. Talegaonkar. It is not the case of the prosecution that the applicants had abetted the commission of the said offence. In view of this factual position, the question which assumes importance is : whether the pregnancy was terminated without the consent of the prosecutrix ? Before considering this aspect, it would be useful to refer to the provisions of section 312 and 313 of the Indian Penal Code.

> "**312. Causing miscarriage.-** Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the

purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation - A woman who causes herself to miscarry, is within the meaning of this section."

"**313. Causing miscarriage without woman's consent.-** Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

7. From the perusal of the aforesaid provisions, it is clear

that section 313 would be attracted only if it is established that the pregnancy is terminated without the consent of the prosecutrix. In the present case, Dr. Talegaonkar has, in his examiantion-in-chief, stated that the prosecutrix had consented to the termination of the pregnancy. However, when previous statement which was made to the police was shown to him, he denied having made that statement. He was, thereafter, declared hostile and this contradiction was proved through the Investigating Officer. It is strange that both the Courts below have relied on the contradiction which was proved by the prosecution for the purpose of recording finding of consent not being obtained from the prosecutrix.

8. The Lower Appellate Court confirmed this finding of the trial Court as is evident from its finding in para 13 of its judgment which reads as under:-

> "13....."The trial court was justified in ignoring the statement of Dr. Talegaonkar that Barki herself had told him that her husband is drunkard, is not looking after her and so she wants to get her

> pregnancy terminated. As his initial version is as disclosed in portion marked A Exh.39 wherein the above referred information is given by 3 accused and not by Barkibai. Further, to be noted that Dr. Talegaonkar admitted the correctness of the letter Exh.33 sent by him to the police station....."

9. In my view, the aforesaid observation, to say the least, is patently perverse. It was not open for the trial court to have relied upon the statement of the witness which was recorded by the police and which was brought on record during the cross-examination after he was declared hostile and, on the other hand, discard his testimony which was recorded in examination-in-chief. It is now a settled position in law that merely because the witness is declared as hostile, his entire testimony cannot be discarded and a part or portion of the his evidence can be relied upon by the Court. In the present case, trial court and the Lower Appellate Court have discarded the evidence of Dr. Talegaonkar which is in favour of the applicants and, on the contrary, relied on the statement made by him to the police which is inadmissible in

evidence. Merely because the contradiction is proved and the statement of witnesses to the police is brought on record, the said evidence cannot be treated as evidence for the purpose of recording a finding against the accused.

10. Further, another curious aspect which needs to be noted here is that the prosecution chose not to make Dr. Talegaonkar as an accused though he had performed the abortion because section 313 makes a person who performs the operation of termination of pregnancy without the consent of the prosecutrix, responsible and liable under the aforesaid provision. It is not the prosecution case that the applicants had abetted Dr. Talegaonkar in performing the operation. The prosecution case is that the operation was performed by Dr. Talegaonkar on misrepresentation made by the applicants. It is not the case of the prosecution that the applicant had abetted the said offence. Therefore, in my view, both the lower Courts misdirected themselves in recording the aforesaid findings and convicting the applicants for the offence punishable under section 313 of the Indian Penal Code.

11. In the result, the following order is passed:-

O R D E R

Criminal Revision Application is allowed. Judgment and order passed by both the Courts below are set aside. Applicants/accused are acquitted of the offence with which they were charged. They are on bail during the trial and during the pendency of this Criminal Revision Application. Their bail bonds stand cancelled.

Criminal Revision Application is disposed of.

(V.M. KANADE, J.)